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Supreme Court, U.S.
FILED

No. 001833 MAY 16 2001

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IN THE

Supreme Court of the United States

October Term, 2000

JOSE VALERIO-OCHOA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED

1. Whether § 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) unconstitutionally violates the plain meaning of Article III of the United States Constitution thereby giving the Court below jurisdiction over this case?

2. Whether discharging a firearm in violation of California Penal Code § 246.3 is a deportable firearms offense pursuant to 8 U.S.C. § 1227 (a)(2)(C)?

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is a published decision which has been recently ordered amended (App. 9a-16a).

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Art. III is set out in the appendix (App. 17a).
2. Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) is set out in the appendix (App. 18a).
3. 8 U.S.C. § 1227(a)(2)(C) is set out in the appendix (App. 19a).
4. Cal. Penal Code § 246.3 is set out in the appendix (App. 20a).

STATEMENT

Petitioner Jose Valerio-Ochoa is a thirty-two-year-old lawful permanent resident of the United States. He was born in Mexico and first came to this country in 1983, over 18 years ago, and has since resided here. On October 12, 1995, he pled guilty to violating California Penal Code § 246.3, to wit: discharging a firearm in a grossly negligent manner. Such conviction was unrelated to any other criminal conduct; in fact, he has no other criminal record. He was sentenced to 150 days' custody in a sheriff's honors camp and three years probation.

On December 15, 1995, the Immigration and Naturalization Service ("INS") brought Jose under deportation proceedings by issuing an Order to Show Cause

alleging he was deportable pursuant to § 241(a)(2)(C), I.&N.Act, 8 U.S.C. § 1251(a)(2)(C) (a firearms offender), which has now been re-codified as 8 U.S.C. § 1227(a)(2)(C). He contested deportability on the ground that his conviction is insufficient to sustain the charge of deportability.

On October 3, 1996, the Immigration Judge ("IJ") found him deportable as charged. Jose filed a timely appeal to the Board of Immigration Appeals ("BIA"); however, the BIA affirmed the IJ's decision. He then filed a timely petition for review before the court of appeals which was governed by IIRIRA § 309(c)(4)(G) IIRIRA since deportation proceedings were initiated before April 7, 1997. The court found him deportable as charged and dismissed his petition on the ground it lacked "jurisdiction to review directly deportations founded on the offenses enumerated in § 1227." See opinion of the court of appeals (App. 1a-8a).

REASONS FOR GRANTING THE PETITION

The court of appeals, in line with its sister circuits, see Hall v. INS, 167 F.3d 852 (4th Cir. 1999), Bereche v. INS, 114 F. 3d 159 (10th Cir. 1997), Vue v. INS, 92 F.3d 696 (8th Cir. 1996), has rendered an important decision involving (a) the constitutional right to judicial review pursuant to the plain meaning of Article II, see for example, Calcano-Martinez v. INS, 232 F.3d 328 (2nd Cir. 2000) and St. Cyr v. INS, 229 F.3d 406 (2nd Cir. 2000), both presently before this Court, and (b) the "long tradition of widespread lawful gun ownership by private individuals in this country," Staples v. United States, 511 U.S. 600, 601, 608-617, 620-621 (1994). Sadly, as shown below, it has done so by (a) begging the question as to whether a constitutional right to judicial review exists, and (b) not giving "adequate account," Staples, supra, to the tradition of lawful gun ownership, respectively.

First, as to the issue of whether IIRIRA § 309(c)(4)(G) violates the plain meaning of Article III thereby requiring

that it be stricken,[1] giving the court of appeals subject matter jurisdiction over this case, remains a novel issue which apparently has never been resolved by the Supreme Court on the basis of the plain meaning of Article III of the United States Constitution. See, Tribe, American Constitutional Law 2d ed., §3.5 at 43 (The Foundation Press, Inc., 1988); see also, Chemerinsky, Federal Jurisdiction, §3.3 "Congressional Restriction Of Lower Federal Court Jurisdiction" at 177 (Little, Brown & Co. 1989); compare Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996), which is qualitatively distinguishable from the "plain meaning" approach set forth herein in that it involves analysis of the issue at hand on the grounds of the doctrine of separation of powers and the right of due process. Accordingly, the principles of stare decisis preclude Duldulao and like cases, such as Calcano-Martinez v. INS, supra, and St. Cyr v. INS, supra, as binding precedent in the case herein. See Cohen v. Virginia, 19 U.S. 264, 399-400 (1821); Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1287-1288 (9th Cir. 1985) (prior decision is not binding precedent on point neither raised by counsel nor discussed in the opinion of the court in that case).

Second, the language of Article III is plain and admits only one reading: the federal judiciary (the Supreme Court and inferior courts, if any) is vested with all judicial power over the cases and controversies enumerated in Article III and Congress' legislative power over such cases is administrative in nature. Such conclusion is arrived at by reading the text of Article III in sequential order as a whole[2] in harmony with the undisputed foundational constitutional principles (i.e., supremacy of the law, independent judiciary, checks and balances, division of authority (the implied doctrine of

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[1] Note that 8 U.S.C. § 1252(a)(2)(C) raises the same issue.

[2] Compare Redish, Federal Jurisdiction: Tension In The Allocation Of Judicial Power 2d ed., Chap. 1, §V at 24-25 (Michie Co., 1990).

"separation of powers")[3] and the like),[4] the other constitutional rights (e.g., due process, habeas corpus)[5] and powers (e.g., Congress' plenary power over aliens)[6] outside the provisions of Article III, the tradition of judicial review of administrative action[7] and the traditional rules of construction.[8]

Third, the plain meaning of the language of Article III is supported by the legislative history thereof. See Berger, **Congress v. The Supreme Court**, (Harvard University Press 1969); Clinton, **A Mandatory View Of Federal Court Jurisdiction: A Quest For The Original Understanding of Article III**, 132 U.Pa.L.Rev. 741 (1984).

Fourth, as to the issue of whether non-criminals who use

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[3] See Redish, 15 Moore's Federal Practice, Chap. 100 § B at 100-52 (Matthew Bender & Co. 1997).

[4] See Hervey, Federal Textbook On Citizenship, Chap XXI (U.S. Dept. of Justice INS 1973); Jaffe, Judicial Control of Administrative Action, Chap. 2 at 29 (Little, Brown & Co. 1965).

[5] See U.S. Const., 5th Amendment (due process) and Art. I, § 9, Cl. 2 (habeas corpus); Note, **The Constitutional Requirement of Judicial Review for Administrative Deportation Decision**, 110 Harv.L.Rev. 1850 (1997).

[6] See 1 Nat'l Lawyers Guild, Immigration Law and Defense 3d ed., § 10.3(a) at 10-10 to 10-13 (Clark Boardman Callaghan 1997); Note, **The Constitutional Requirement of Judicial Review For Administrative Deportation Decision**, 110 Harv.L.Rev. 1850 (1997), discussing in relevant part the textual infirmity of the plenary doctrine.

[7] See Jaffe, Judicial Control of Administrative Action, Chap. 9 (Little, Brown & Co. 1965) (". . . judicial review is the necessary condition . . . of a system of administrative power . . .").

[8] See Rotunda & Nowak, Treatise On Constitutional Law: Substance and Procedure 2d ed., §§ 23.11, 23.12 & 23.30 (West Pub. Co. 1992);

a gun in situations unconnected to another crime[9] are nevertheless deportable in a similar fashion to criminals who use a gun in committing a crime, it is clear that the opinion of the court of appeals does not give "adequate account" to the tradition of lawful gun ownership thereby giving rise to absurd results, particularly in the face of contrary legislative history. See "Immigration and Nationality Act of 1952," Conference Report-Statement of the Managers on the Part of the House, 1952 U.S. Code Cong. and Adm. News 1653 at 1753-1756, stating in relevant part that the "Attorney General may not . . . capriciously deport . . . solely on the basis of inconsequential, unwitting infraction of the law . . ."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Raul M. Montes
Armando M. Montes
Gilbert M. Montes
Attorneys For Petitioner

Dated: May 16, 2001

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[9] Query: must a lawful resident alien with no license or permit to use a gun who suddenly finds himself under attack but in the vicinity of a gun choose between self-defense and deportation in light of the court of appeals' interpretation of 8 U. S.C. § 1227(a)(2)(C) in the case herein?

INDEX TO APPENDICES

1. Opinion of court of appeals sought to reviewed (App. 1a-8a);

2. Order and amended opinion of court of appeals sought to be reviewed (App. 9a-16a);

3. U.S. Const., Art. III (App. 17a);

4. IIRIRA § 309(c)(4)(G) (App. 18a);

5. 8 U.S.C. § 1227(a)(2)(C) (App. 19a);

6. Cal. Penal Code § 246.3 (App. 20a)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE VALERIO-OCHOA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 98-70529
INS No.
A92-675-197
OPINION

Petition to Review a Decision of the
Board of Immigration Appeals

Argued and Submitted
January 11, 2001—Pasadena, California

Filed February 15, 2001

Before: Stephen S. Trott, Sidney R. Thomas and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Thomas

SUMMARY

Immigration/Criminal Law and Procedure

The court of appeals dismissed a petition for review. The court held that willfully discharging a firearm in a grossly negligent manner in violation of the California Penal Code is a deportable firearms offense.

Jose Valerio-Ochoa, a native and citizen of Mexico, and a lawful permanent resident of the United States pleaded guilty

in California state court to negligently discharging a firearm. In his written guilty plea, Valerio-Ochoa acknowledged that his plea of guilty might adversely affect his immigration status. He had no other criminal record.

The Immigration and Naturalization Service (INS) served him with an order to show cause why he was not deportable under Immigration and Naturalization Act § 241(a)(2)(C) based upon the California conviction. Valerio-Ochoa contested deportability, arguing that because his conviction sounded in negligence, and was not a criminal use of a firearm, he did not fit within the meaning of the firearm provision of § 241(a)(2)(C). The immigration judge found that Valerio-Ochoa's conviction for discharging a firearm conclusively established deportability under § 241(a)(2)(C). The Board of Immigration Appeals affirmed the immigration judge's order.

Valerio-Ochoa petitioned for review. His petition was governed by the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

[1] Under the transitional rules, there shall be no appeal permitted in the case of an alien who is deportable by reason of having committed a criminal offense enumerated in section 241(a)(2)(C).

[2] The statute of which Valerio-Ochoa was convicted provides that a person who willfully discharges a firearm in a grossly negligent manner shall be punished in the county jail, or by imprisonment in the state prison. [3] California courts have found that discharging a firearm in a grossly negligent manner can constitute a serious felony.

[4] The act of willfully discharging a firearm in a grossly negligent manner in violation of the California Penal Code qualified as "using" a firearm for purposes of deportability under federal statute.

COUNSEL

Raul M. Montes, Armando M. Montes and Gilbert M. Montes; Montes, Montes & Montes; San Diego, California, for the petitioner.

Brian Slocum and Margaret Perry; United States Department of Justice; Washington, D.C., for the respondent.

OPINION

THOMAS, Circuit Judge:

We consider in this appeal whether negligently discharging a firearm in violation of California Penal Code § 246.3 is a deportable firearms offense pursuant to 8 U.S.C. § 1227. We conclude that it is, and dismiss Valerio-Ochoa's petition for review for lack of jurisdiction pursuant to IIRIRA § 309(c)(4)(G).

I

Jose Valerio-Ochoa is a thirty-two-year-old native and citizen of Mexico, and a lawful permanent resident of the United States. He first entered the United States without inspection from Mexico in 1983. On December 1, 1990, he adjusted his status to that of lawful permanent resident pursuant to INA § 210(A), the Immigration Reform and Control Act of 1986. He has joint legal custody of a six-year-old United States citizen daughter by his former wife, Nancy Lopez, from whom he divorced in March, 1997. He has been employed since his arrival in the United States, first as a fieldworker, and later as an employee at various scaffolding companies.

On October 12, 1995, Valerio-Ochoa was convicted, by guilty plea, of discharging a firearm in a grossly negligent

manner in violation of California Penal Code § 246.3. In his written guilty plea, Valerio-Ochoa initialed a provision wherein he acknowledged that his plea of guilty might adversely affect his immigration status. He served 150 days' custody in a sheriff's honors camp, followed by three years' probation. Valerio-Ochoa has no other criminal record.

On December 15, 1995, the Immigration and Naturalization Service ("INS") served him with an Order to Show Cause why he was not deportable under INA § 241(a)(2)(C) based upon the California conviction. Valerio-Ochoa contested deportability. He maintained that because his conviction "sounded in negligence," and was not a criminal use of a firearm, he did not fit within the meaning of the firearm provision of the INA, § 241(a)(2)(C). The immigration judge found that Valerio-Ochoa's conviction for discharging a firearm conclusively established deportability under § 241(a)(2)(C). The Board of Immigration Appeals affirmed the immigration judge's order. This timely petition for review followed.

Because the final agency order was entered after October 30, 1996, and deportation proceedings were initiated before April 1, 1997, this petition is governed by the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), *as amended by* Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996).

II

[1] Under the transitional rules, "there shall be no appeal permitted in the case of an alien who is . . . deportable by reason of having committed a criminal offense" enumerated in section 241(a)(2)(C) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1227 (a)(2)(C). IIRIRA § 309(c)(4)(G). Thus, if Valerio-Ochoa committed one of the enumerated offenses and is charged with doing so in an Order to Show Cause served by the INS, we lack jurisdiction to con-

sider his petition for review. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1090 (9th Cir. 2000). We do, however, have jurisdiction to determine our own jurisdiction under the transitional rules. *Scales v. INS*, 232 F.3d 1159, 1161 (9th Cir. 2000). In the context of IIRIRA § 309(c)(4)(G), this means we have jurisdiction to decide whether Valerio-Ochoa has committed one of the offenses enumerated in 8 U.S.C. § 1227 (a)(2)(C).[1]

Valerio-Ochoa argues that a conviction for violation of California Penal Code § 246.3 does not qualify as a predicate firearms offense under IIRIRA because (1) Congress did not intend to include negligent conduct as a qualifying offense, and (2) "pure" firearms offenses do not fall within the orbit of § 1227—that is, that § 1227 is limited to non-firearms offenses involving the use of firearms.

A

[2] The statute of which Valerio-Ochoa was convicted, discharging a firearm in a grossly negligent manner, provides:

> Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished in the county jail not exceeding one year, or by imprisonment in the state prison.

[1]Valerio-Ochoa also claims that section 309(c)(4)(G) unconstitutionally violates the separation of powers requirement inherent in Article III of the United States Constitution. However, because the judicial review limitations of IIRIRA's transitional rules do not preclude us from considering the merits of Valerio-Ochoa's only substantive claim in this case—that is, his claim that his firearms offense does not render him "deportable"—Valerio-Ochoa does not have standing to challenge the constitutionality of those provisions. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1988) (an injury in fact is a constitutional prerequisite to Article III jurisdiction).

California Penal Code § 246.3.

[3] This statute was enacted to prevent revelers from discharging firearms on holidays such as New Year's Eve and Independence Day. *People v. Alonzo*, 13 Cal. App. 4th 535, 539 (1993). Nonetheless, California courts have found that a violation of this provision can constitute a "serious felony" for purposes of that state's "three strikes" law. *People v. Leslie*, 47 Cal. App. 4th 198, 201 (2000).

Valerio-Ochoa maintains that California Penal Code § 246.3 criminalizes negligent conduct, and therefore cannot constitute a predicate offense under IIRIRA. The California statute does not, however, criminalize purely negligent conduct; only "willful" discharges of firearms violate the statute, not negligent discharges.

The reach of 8 U.S.C. § 1227 (a)(2)(C) is certainly broad enough to include such a statute. It provides, in relevant part, that "*[a]ny alien* who *at any time* after admission *is convicted under any law* of purchasing, selling, offering for sale, exchanging, *using*, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) *in violation of any law is deportable*." 8 U.S.C. § 1227(a)(2)(C) (emphasis supplied). From a plain reading of the statute, it is clear that Congress intended to embrace the entire panoply of firearms offenses. As the Fourth Circuit noted in *Hall v. INS*, 167 F.3d 852, 855 (4th Cir. 1999):

> Its comprehensive list of gerunds captures all varieties of conduct relating to firearms transactions. It includes inchoate as well as completed offenses, enumerating not only the sale, use, ownership, or possession of firearms, but also any attempt or conspiracy to do so. Finally, it encompasses convictions

> "under any law" of engaging or attempting to engage in such transactions. This wide-ranging text evinces an expansive purpose — to render deportable those aliens that commit firearms offenses of any type.

[4] Clearly, under any fair reading, the act of "willfully discharg[ing] a firearm in a grossly negligent manner" in violation of Cal. Penal Code § 246.3 qualifies as "using" a firearm under 8 U.S.C. § 1227(a)(2)(C).

B

Valerio-Ochoa's argument that § 1227(a)(2)(C) does not encompass "pure" firearms convictions, but only those convictions in furtherance of another crime, is also not tenable. Indeed, the subsection title "Certain Firearms Offenses" belies the contention that firearms offenses are not embraced within its coverage. *See Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1175 (9th Cir. 1999) (noting that section headings are tools available for statutory construction). Of course, the plain language of the statute does so as well: it includes a conviction in violation "of any law;" it does not restrict coverage to "any *other* law." Indeed, including a conviction "under any law" and further providing that use of the firearm also be "in violation of any law" supports the construction that Congress intended to include *both* "pure" firearms offenses and other crimes in which a firearm was employed.

Our sister circuits have construed § 1227 as reaching both "pure" firearms offenses and the use of firearms in connection with other crimes. *Hall*, 167 F.3d at 855-56 (making a false statement to a federally licensed firearms dealer is a deportable offense); *Berehe v. INS*, 114 F.3d 159, 161 (10th Cir. 1997) (use of a firearm in connection with the crime of assault is a deportable offense); *Vue v. INS*, 92 F.3d 696, 701 (8th Cir. 1996) (aggravated robbery constituted a deportable firearms offense when a weapon was used in connection with the crime); *see also Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996)

(upholding deportation under § 241(a)(2)(C) based on two unspecified firearms offenses in violation of Hawaii law).

Therefore, we conclude that § 1227 includes the listed firearms offenses regardless of whether another crime was committed.

III

In summary, a conviction under Cal. Penal Code § 246.3 constitutes a deportable offense under 8 U.S.C. § 1227. Because Congress has withdrawn our jurisdiction to review directly deportations founded on the offenses enumerated in § 1227, we lack jurisdiction to consider this petition for review. IIRIRA § 309(c)(4)(G).

PETITION DISMISSED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE VALERIO-OCHOA, *Petitioner,* v. IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*	No. 98-70529 INS No. A92-675-197 ORDER AND AMENDED OPINION

Petition to Review a Decision of the
Board of Immigration Appeals

Argued and Submitted
January 11, 2001—Pasadena, California

Filed February 15, 2001
Amended April 25, 2001

Before: Stephen S. Trott, Sidney R. Thomas and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Thomas

SUMMARY

Immigration/Criminal Law and Procedure

The court of appeals dismissed a petition for review. The court held that willfully discharging a firearm in a grossly negligent manner in violation of the California Penal Code is a deportable firearms offense.

Jose Valerio-Ochoa, a native and citizen of Mexico, and a lawful permanent resident of the United States pleaded guilty in California state court to negligently discharging a firearm. In his written guilty plea, Valerio-Ochoa acknowledged that his plea of guilty might adversely affect his immigration status. He had no other criminal record.

The Immigration and Naturalization Service (INS) served him with an order to show cause why he was not deportable under Immigration and Naturalization Act § 241(a)(2)(C) based upon the California conviction. Valerio-Ochoa contested deportability, arguing that because his conviction sounded in negligence, and was not a criminal use of a firearm, he did not fit within the meaning of the firearm provision of § 241(a)(2)(C). The immigration judge found that Valerio-Ochoa's conviction for discharging a firearm conclusively established deportability under § 241(a)(2)(C). The Board of Immigration Appeals affirmed the immigration judge's order.

Valerio-Ochoa petitioned for review. His petition was governed by the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

[1] Under the transitional rules, there shall be no appeal permitted in the case of an alien who is deportable by reason of having committed a criminal offense enumerated in section 241(a)(2)(C).

[2] The statute of which Valerio-Ochoa was convicted provides that a person who willfully discharges a firearm in a grossly negligent manner shall be punished in the county jail, or by imprisonment in the state prison. [3] California courts have found that discharging a firearm in a grossly negligent manner can constitute a serious felony.

[4] The act of willfully discharging a firearm in a grossly negligent manner in violation of the California Penal Code

qualified as "using" a firearm for purposes of deportability under federal statute.

COUNSEL

Raul M. Montes, Armando M. Montes and Gilbert M. Montes; Montes, Montes & Montes; San Diego, California, for the petitioner.

Brian Slocum and Margaret Perry; United States Department of Justice; Washington, D.C., for the respondent.

ORDER

It is ordered that the opinion filed on February 15, 2001, be amended to delete the word "negligently" in the first line of the opinion, so that the first sentence now states:

> We consider in this appeal whether discharging a firearm in violation of California Penal Code § 246.3 is a deportable firearms offense pursuant to 8 U.S.C. § 1227.

OPINION

THOMAS, Circuit Judge:

We consider in this appeal whether discharging a firearm in violation of California Penal Code § 246.3 is a deportable firearms offense pursuant to 8 U.S.C. § 1227. We conclude that it is, and dismiss Valerio-Ochoa's petition for review for lack of jurisdiction pursuant to IIRIRA § 309(c)(4)(G).

I

Jose Valerio-Ochoa is a thirty-two-year-old native and citizen of Mexico, and a lawful permanent resident of the United States. He first entered the United States without inspection from Mexico in 1983. On December 1, 1990, he adjusted his status to that of lawful permanent resident pursuant to INA § 210(A), the Immigration Reform and Control Act of 1986. He has joint legal custody of a six-year-old United States citizen daughter by his former wife, Nancy Lopez, from whom he divorced in March, 1997. He has been employed since his arrival in the United States, first as a fieldworker, and later as an employee at various scaffolding companies.

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April 1, 1997, this petition is governed by the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), *as amended by* Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996).

II

[1] Under the transitional rules, "there shall be no appeal permitted in the case of an alien who is . . . deportable by reason of having committed a criminal offense" enumerated in section 241(a)(2)(C) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1227 (a)(2)(C). IIRIRA § 309(c)(4)(G). Thus, if Valerio-Ochoa committed one of the enumerated offenses and is charged with doing so in an Order to Show Cause served by the INS, we lack jurisdiction to consider his petition for review. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1090 (9th Cir. 2000). We do, however, have jurisdiction to determine our own jurisdiction under the transitional rules. *Scales v. INS*, 232 F.3d 1159, 1161 (9th Cir. 2000). In the context of IIRIRA § 309(c)(4)(G), this means we have jurisdiction to decide whether Valerio-Ochoa has committed one of the offenses enumerated in 8 U.S.C. § 1227 (a)(2)(C).[1]

Valerio-Ochoa argues that a conviction for violation of California Penal Code § 246.3 does not qualify as a predicate firearms offense under IIRIRA because (1) Congress did not

[1]Valerio-Ochoa also claims that section 309(c)(4)(G) unconstitutionally violates the separation of powers requirement inherent in Article III of the United States Constitution. However, because the judicial review limitations of IIRIRA's transitional rules do not preclude us from considering the merits of Valerio-Ochoa's only substantive claim in this case—that is, his claim that his firearms offense does not render him "deportable"—Valerio-Ochoa does not have standing to challenge the constitutionality of those provisions. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1988) (an injury in fact is a constitutional prerequisite to Article III jurisdiction).

intend to include negligent conduct as a qualifying offense, and (2) "pure" firearms offenses do not fall within the orbit of § 1227—that is, that § 1227 is limited to non-firearms offenses involving the use of firearms.

A

[2] The statute of which Valerio-Ochoa was convicted, discharging a firearm in a grossly negligent manner, provides:

> Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished in the county jail not exceeding one year, or by imprisonment in the state prison.

California Penal Code § 246.3.

[3] This statute was enacted to prevent revelers from discharging firearms on holidays such as New Year's Eve and Independence Day. *People v. Alonzo*, 13 Cal. App. 4th 535, 539 (1993). Nonetheless, California courts have found that a violation of this provision can constitute a "serious felony" for purposes of that state's "three strikes" law. *People v. Leslie*, 47 Cal. App. 4th 198, 201 (2000).

Valerio-Ochoa maintains that California Penal Code § 246.3 criminalizes negligent conduct, and therefore cannot constitute a predicate offense under IIRIRA. The California statute does not, however, criminalize purely negligent conduct; only "willful" discharges of firearms violate the statute, not negligent discharges.

The reach of 8 U.S.C. § 1227 (a)(2)(C) is certainly broad enough to include such a statute. It provides, in relevant part, that "*[a]ny alien* who *at any time* after admission *is convicted under any law* of purchasing, selling, offering for sale,

exchanging, *using*, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) *in violation of any law is deportable*." 8 U.S.C. § 1227(a)(2)(C) (emphasis supplied). From a plain reading of the statute, it is clear that Congress intended to embrace the entire panoply of firearms offenses. As the Fourth Circuit noted in *Hall v. INS*, 167 F.3d 852, 855 (4th Cir. 1999):

> Its comprehensive list of gerunds captures all varieties of conduct relating to firearms transactions. It includes inchoate as well as completed offenses, enumerating not only the sale, use, ownership, or possession of firearms, but also any attempt or conspiracy to do so. Finally, it encompasses convictions "under any law" of engaging or attempting to engage in such transactions. This wide-ranging text evinces an expansive purpose — to render deportable those aliens that commit firearms offenses of any type.

[4] Clearly, under any fair reading, the act of "willfully discharg[ing] a firearm in a grossly negligent manner" in violation of Cal. Penal Code § 246.3 qualifies as "using" a firearm under 8 U.S.C. § 1227(a)(2)(C).

B

Valerio-Ochoa's argument that § 1227(a)(2)(C) does not encompass "pure" firearms convictions, but only those convictions in furtherance of another crime, is also not tenable. Indeed, the subsection title "Certain Firearms Offenses" belies the contention that firearms offenses are not embraced within its coverage. *See Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1175 (9th Cir. 1999) (noting that section headings are tools available for statutory construction). Of course, the plain language of the statute does so as well: it includes a con-

viction in violation "of any law;" it does not restrict coverage to "any *other* law." Indeed, including a conviction "under any law" and further providing that use of the firearm also be "in violation of any law" supports the construction that Congress intended to include *both* "pure" firearms offenses and other crimes in which a firearm was employed.

Our sister circuits have construed § 1227 as reaching both "pure" firearms offenses and the use of firearms in connection with other crimes. *Hall*, 167 F.3d at 855-56 (making a false statement to a federally licensed firearms dealer is a deportable offense); *Berehe v. INS*, 114 F.3d 159, 161 (10th Cir. 1997) (use of a firearm in connection with the crime of assault is a deportable offense); *Vue v. INS*, 92 F.3d 696, 701 (8th Cir. 1996) (aggravated robbery constituted a deportable firearms offense when a weapon was used in connection with the crime); *see also Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996) (upholding deportation under § 241(a)(2)(C) based on two unspecified firearms offenses in violation of Hawaii law).

Therefore, we conclude that § 1227 includes the listed firearms offenses regardless of whether another crime was committed.

III

In summary, a conviction under Cal. Penal Code § 246.3 constitutes a deportable offense under 8 U.S.C. § 1227. Because Congress has withdrawn our jurisdiction to review directly deportations founded on the offenses enumerated in § 1227, we lack jurisdiction to consider this petition for review. IIRIRA § 309(c)(4)(G).

PETITION DISMISSED.

ARTICLE III—THE JUDICIARY

Sec.

1. Judicial Power, Tenure and Compensation.
2. Jurisdiction of Courts; Supreme Court, Original and Appellate Jurisdiction; Criminal Trial by Jury.
Cl.
1. Jurisdiction of Courts.
2. Supreme Court, Original and Appellate Jurisdiction.
3. Criminal Trial by Jury.
3. Treason; Punishment of Treason.
Cl.
1. Treason.
2. Punishment of Treason.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

[1] This clause has been affected by the Eleventh Amendment.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

IIRIRA § 309(c)(4)(G)

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

Historical and Statutory Notes

1994 Legislation

The 1994 amendment, in subd. (a), inserted "or the unlawful possession of a firearm by a member of a criminal street gang, as defined in subdivision (f) of Section 186.22, while present in a vehicle" following "public street or highway"; and made a nonsubstantive change.

§ 246.3. Discharging firearm in grossly negligent manner; punishment

Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison.

(Added by Stats.1988, c. 1275, § 1, eff. Sept. 26, 1988.)

Notes of Decisions